Nos. 00-1531 and 00-1711

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IN THE

Supreme Court of the United States

VERIZON MARYLAND INC., and
UNITED STATES OF AMERICA,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC IN SUPPORT OF PETITIONERS

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REPLY BRIEF OF RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC

Respondents MCI WORLDCOM, Inc., and MCImetro Access Transmission Services LLC (collectively "WorldCom") demonstrated in their opening brief and in WorldCom's brief in the companion case, *Mathias v. WorldCom Technologies, Inc.*, No. 00-878 (U.S. filed September 10, 2001), that federal courts have jurisdiction under 28 U.S.C. § 1331 to consider whether a state public utility commission has violated federal law in interpreting or enforcing an interconnection agreement entered into pursuant to the Telecommunications Act of 1996 (the "1996 Act" or "Act"). The arguments in response by the Public Service Commission of Maryland ("MPSC") and *amici curiae* the

Virginia State Corporation Commission ("VSCC") and the Illinois Commerce Commission ("ICC") are without merit.

Bedrock principles of federal jurisdiction confirm that federal courts may adjudicate claims that state commission decisions interpreting and enforcing interconnection agreements violate the 1996 Act or applicable FCC regulations. The state commissions' arguments against the existence of a private right of action are off-point for two reasons: (1) they confuse the jurisdictional inquiry with the existence of a right of action, and (2) they incorrectly assume that a right to sue under section 1331 to enforce the 1996 Act could only be created by the Act itself.

On the other hand, Verizon goes too far – and well beyond the scope of the Court's grant of review – in contending that "Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law." Verizon Br. at 20; *see id.* at 12. The Court should not accept Verizon's invitation to address the merits of its claim that a misinterpretation of an interconnection agreement by a state commission necessarily violates the 1996 Act. The sole question presented in this case is whether there is federal jurisdiction to entertain a claim that a state commission's enforcement decision violated the Act, not the merits question whether Verizon actually articulated a valid federal claim. But if the Court chooses to reach Verizon's additional arguments about the *scope* of federal jurisdiction in enforcement cases, it should reject them.

I. Federal Courts Have Jurisdiction to Address Claims that State Commission Determinations Violate Federal Law.

The MPSC and its supporting *amici* do not even attempt to counter the fundamental premise of WorldCom's jurisdictional argument: that federal question jurisdiction exists over Verizon's claims because "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)); WorldCom Br. at 16-22. Instead, they argue that federal question jurisdiction does not exist under section 1331 because the 1996 Act does not create a private right of action, either express or implied, for challenges to state commission enforcement orders. That approach is faulty for two reasons.

First, whether courts have subject matter jurisdiction – the only question presented here – is a threshold question separate from and antecedent to the question whether the plaintiff has a cause of action. *Steel Co.*, 523 U.S. at 89; *Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 21 n.6 (1982). Here, to the extent that Verizon asserted non-frivolous claims to relief predicated on a specific interpretation of federal law, federal question jurisdiction exists under section 1331.

Second, as to the right of action issue, the MPSC incorrectly presumes that any right of action must be created

by the 1996 Act itself.[1] That is not the case. A carrier seeking injunctive relief on the ground that a state commission order is inconsistent with federal law has a private right of action both directly under the Supremacy Clause of the United States Constitution and under 42 U.S.C. § 1983. There is thus no reason to invoke "implied right of action" case law in this context. Moreover, even if *federal* law did not provide a clear right to seek judicial relief to bring state officials into compliance with federal law, state law would resolve any right of action issue in this context. As the MPSC acknowledges, MPSC Br. at 24, state administrative review procedures give carriers a right of action to challenge state commission orders enforcing interconnection agreements in state court. When the claims at issue are predicated on federal law, that same state-law-based review action may be brought to federal court under section 1331. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8-10 (1983).

[1] In its *Mathias* brief, WorldCom has shown that section 252(e)(6) of the Act grants jurisdiction and provides an express right of action for federal court review of a state commission determination enforcing an interconnection agreement. Br. of WorldCom at 22-28, *Mathias v. WorldCom Techs., Inc.*, No. 00-878. WorldCom has also shown, however, that resolution of the section 252(e)(6) question in *Mathias* is not necessary to determine whether jurisdiction exists under section 1331. *Id.* at 15-22. Thus, because the question presented here does not directly implicate section 252(e)(6), WorldCom will assume, for purposes of this reply brief, that section 252(e)(6) does not apply. Nevertheless, if the Court reaches the section 252(e)(6) issue in *Mathias* and concludes that it provides a cause of action in enforcement cases, the present discussion of private rights of action would be unnecessary.

A. The MPSC's Argument Inverts the Jurisdictional Inquiry.

The thrust of the MPSC's argument is that federal courts must *first* determine whether the plaintiff's complaint states a cognizable federal cause of action and *then* discern whether federal question jurisdiction exists. MPSC Br. at 11-22. That formulation has it backwards. Subject matter jurisdiction is a "threshold matter" which courts must address before determining whether the plaintiff has a valid cause of action. *Steel Co.*, 523 U.S. at 94-95; *id* at 89-90 ("jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover"); *Jackson Transit*, 457 U.S. at 21 n.6 (where complaint claims violation of federal law, courts have subject matter jurisdiction to determine whether cause of action exists under that federal law).

In undertaking that threshold inquiry, the court "must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell v. Hood*, 327 U.S. 678, 681 (1946). Stated somewhat more precisely, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co.*, 523 U.S. at 89 (quoting *Bell v. Hood*, 327 U.S. at 685); *see generally* WorldCom Br., Nos. 00-1531, 00-1711, at 16-19.

Under that standard, the federal district court had jurisdiction to entertain Verizon's complaint, which expressly alleged that both the 1996 Act and the FCC's implementing regulations insulated Verizon from having to

pay reciprocal compensation for calls to Internet Service Providers ("ISPs"). Compl. ¶¶ 3, 4, 5, 25, 31-32, 35. Clearly, Verizon raised meritorious claims if and only if the 1996 Act and the FCC regulations were given the construction it proposed. That is all that is required to invoke section 1331.[2]

B. Carriers Have a Private Right of Action to Challenge State Commission Enforcement Orders Under the Supremacy Clause, Section 1983, and State Law.

Carriers asserting claims like those of Verizon do have a right of action in federal court, derived from both federal and state law.

1. The Supremacy Clause

Verizon's complaint asserts a straightforward claim of preemption actionable under the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2. This

[2] This is not to say that Verizon's claims were actually meritorious. In its effort to counter the MPSC's conclusion that Verizon had validly agreed to pay compensation for ISP calls, Verizon relied on FCC regulations limiting reciprocal compensation to "local traffic" and on an FCC ruling that ISP calls are not "local traffic." As Verizon acknowledges, however, that FCC ruling was later vacated by the D.C. Circuit. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). On remand, the FCC dropped its use of the term "local traffic" as the touchstone for determining whether calls are subject to reciprocal compensation, adopting an entirely different statutory analysis based on 47 U.S.C. § 251(g). *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151 (2001). That new ruling, which does not purport to interfere retroactively with interconnection agreements containing promises to pay reciprocal compensation for ISP calls (like the promise the MPSC found to exist here), is being challenged in the D.C. Circuit.

Court has never required that such preemption claims be expressly authorized by an act of Congress. Rather, preemption claims are actionable directly under the Supremacy Clause and do not require a separate statutory cause of action under the federal law at issue. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 387-88 (2000); *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 501-02 (1984). *Accord, Western Air Lines, Inc. v. Port Auth. of N.Y. and N.J.*, 817 F.2d 222, 225-26 (2d Cir. 1987) (citing *White Mountain Apache Tribe v. Williams*, 810 F.3d 844, 847 (9th Cir. 1987)). In *Crosby*, for example, the Court sustained a preemption action directly under the Supremacy Clause where a state statute was inconsistent with the provisions of a federal appropriations act that delegated certain rights and duties to the President – a statute that clearly did not create any private right of action itself. 530 U.S. at 387-88. Thus, regardless of whether the 1996 Act creates a private right of action, Verizon has a right of action under the Supremacy Clause to seek declaratory and injunctive relief against state commission orders that Verizon claims were contrary to, or preempted by, federal law.

Although the MPSC contends that a right of action arises only if a federal statute totally precludes state regulation of the matter being litigated, MPSC Br. at 19, that is not the law. Preemption can and does occur where Congress has allowed some state regulation while enacting particular requirements that states are obligated to respect. That kind of "conflict" preemption is treated no differently than "field" preemption. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). The *scope* of Congress's preemption of state regulation cannot logically affect a party's right to ask the federal courts for redress when states

enact regulations barred by federal law.[3] Put differently, the fact that states were authorized to do some things in a given area should not affect the remedies available when they do something else that is prohibited. As this Court has explained, "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing cases).

2. Section 1983

Even without regard to the Supremacy Clause, Verizon has a private right of action for declaratory and injunctive relief under 42 U.S.C. § 1983. Section 1983 provides a plaintiff with a private right of action against any person who, under color of state law, deprives the plaintiff of a right, privilege or immunity secured by the Constitution or federal statutes. *See Blessing v. Freestone*, 520 U.S. 329, 340 (1997). It is a "generally and presumptively available federal remedy" for claimed violations of federal rights by state officials. *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994). To prevail on a claim under section 1983, the asserted federal right must meet certain criteria: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the right created by the statute must not be so vague and amorphous that its

[3] The MPSC does cite one district court decision drawing this distinction – *Utility Reform Network v. California Public Utilities Commission*, 26 F. Supp. 2d 1208, 1213 (N.D. Cal. 1998), cited in MPSC Br. at 19-20. But the authorities cited by that court – principally the *Western Air Lines* decision of the Second Circuit – do not support the distinction.

enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the states. *Blessing*, 520 U.S. at 340-41. If these elements are satisfied, then section 1983 applies except in a rare case where a section 1983 action would be inconsistent with Congress's carefully crafted remedial scheme. *Id.* at 346-47.

Under the *Blessing* test, the provisions of the Act and the FCC regulations that give carriers the right to demand certain terms and conditions in interconnection agreements certainly create federal "rights" that are presumptively enforceable under section 1983.[4] Moreover, no feature of the Act, such as a comprehensive remedial scheme, suggests a congressional intent to bar claims under section 1983. *See GTE North, Inc. v. Strand*, 209 F.3d 909, 916 (6th Cir. 2000) (action challenging state commission order as inconsistent with 1996 Act properly brought under section 1983), *cert. denied*, 531 U.S. 957 (2000). Because Verizon alleged that the MPSC's enforcement decision deprived it of rights guaranteed under the Act and FCC regulations, it could validly invoke section 1983.

3. State law cause of action under Maryland administrative review procedures

Finally, even if *federal* law did not create a private right of action, Verizon has a state law cause of action under Maryland's administrative review act, Md. Code Ann., Pub.

[4] The *Blessing* test should not be construed as requiring a showing of congressional intent comparable to that required in "implied right of action" cases. To do so would render section 1983 superfluous in statutory cases and effectively deny Congress the right to rely on section 1983 in passing new legislation affecting state obligations, without having to signify its intent regarding rights of action in each new piece of legislation.

Utils. Cos. § 3-203 *et seq.*[5] The MPSC does not deny that Verizon's federal claims can be heard in the context of that state law review procedure. It simply contends that Verizon's claims must be heard in state rather than federal court. MPSC Br. at 24; *see* ICC Br. at 7.

That is incorrect. Because the gravamen of Verizon's claims is that the agency violated specific federal rights, it is entitled to invoke its state-created right to administrative review in federal court. This Court has recognized that, even where a plaintiff's right of action is created by state law, the claims arise under the laws of the United States for purposes of section 1331 if the plaintiff's "well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law." *International College of Surgeons*, 522 U.S. at 164 (quoting *Franchise Tax Bd.*, 463 U.S. at 13).

In *International College of Surgeons*, the plaintiff filed an administrative appeal in state court under the Illinois Administrative Review Law to challenge a decision of the Chicago Historical and Architectural Landmarks Commission. *Id.* In addition to various state law claims, the plaintiffs also asserted that the commission's decision violated various rights secured by federal law. When the defendant sought to remove the case to federal court, the question arose whether the action originally could have been brought in federal court under section 1331. The Court

[5] Verizon also has a more circumscribed cause of action against other private carriers under state contract law. As this Court held in *Jackson Transit*, where Congress has required private parties to enter into contracts pursuant to a federal statutory scheme, Congress presumably intended those contracts to be enforceable through a private right of action (though not necessarily involving federal questions, *see infra* pp. 16-17). *See* 457 U.S. at 20-21. Otherwise, Congress's directive that the parties enter into the contract in the first instance would be meaningless.

concluded that the plaintiff's claims alleging that the commission's decision violated the plaintiff's rights under federal law "unquestionably" satisfied the test for jurisdiction under section 1331. *Id.* That same conclusion applies here.[6]

4. *Rooker-Feldman* Does Not Apply Here.

Contrary to the MPSC's contention, the *Rooker-Feldman* doctrine has no application here. *Rooker-Feldman* is derived from 28 U.S.C. § 1257, which gives this Court jurisdiction to hear certain appeals from the highest court of a state. Reading that jurisdictional grant as exclusive, this Court has held that lower federal courts lack jurisdiction over challenges to the decisions of a state's highest court and issues "inextricably intertwined" with the judgment of a state's highest court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

[6] The ICC makes the additional argument that Verizon's claims are not civil actions within the federal courts' original jurisdiction because, under the Maryland administrative review scheme, the court would be limited to on-the-record review of the MPSC's decision and would be required to afford deference to the MPSC's determinations. ICC Br. at 19-29. This Court rejected that argument in *International College of Surgeons*, 522 U.S. at 167-68 (claims limited to the administrative record "arise under federal law for purposes of federal question jurisdiction"); *id.* at 171 ("district courts frequently conduct deferential review pursuant to their original jurisdiction over federal questions"). *See also Califano v. Sanders*, 430 U.S. 99, 106-07 & n.7 (1977) (Congress intended section 1331 to grant jurisdiction over review of agency action). Contrary to the ICC's argument, the outcome in *International College of Surgeons* did not turn on the fact that one of the federal claims at issue had not been raised administratively and thus did not warrant deferential review. *International College of Surgeons*, 522 U.S. at 169-71.

This Court has never applied *Rooker-Feldman* to bar review of the determination of a state administrative agency in federal district court. The Court's analysis in *Feldman* is not to the contrary. *See* MPSC Br. at 44-45. There, the Court considered whether a state *court* decision denying an application for waiver of certain requirements to sit for the state bar exam was sufficiently judicial in character to bring it within this Court's exclusive jurisdiction. 460 U.S. at 476-77. Nothing in that analysis suggests that the doctrine should be extended to protect state administrative agencies from federal judicial review. Indeed, this Court has recognized that federal district courts have *original* jurisdiction to review decisions of state administrative agencies. *See International College of Surgeons*, 522 U.S. at 170-71.[7]

II. Verizon's Argument for Creation of Federal Common Law Is Not Encompassed by the Question Presented, Has Been Rejected by the Courts of Appeals, and Is Contrary to the Terms of the Act.

Verizon, like Ameritech in *Mathias*, pushes far beyond the question presented to argue that federal common law governs the interpretation of negotiated provisions in interconnection agreements. Although the incumbent carriers in both cases devote considerable ingenuity to interweaving this argument with others, in reality there is no need for the Court to address the argument in order to answer the questions presented in either case. Indeed, this Court has declined to grant Ameritech's petition challenging the

[7] Applying *Rooker-Feldman* here would also effectively impose a requirement that Verizon exhaust its state judicial remedies before asserting its federal claim to this Court. This Court has held that exhaustion of state remedies is not required under section 1983. *See Edwards v. Balisok*, 520 U.S. 641, 649 (1997). Moreover, requiring exhaustion of state *judicial* remedies would effectively repeal section 1983 as applied to administrative agency cases.

Seventh Circuit's holding that interpretation of interconnection agreements is governed by state contract law. *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, No. 00-921. But if the Court nevertheless reaches the issue, it should hold that claims of misinterpretation of interconnection agreements arise under state law.

A. The Issue of the Scope of Federal Claims in Enforcement Cases Is Not Before the Court.

In this case and *Mathias*, the Court reformulated the questions presented to limit argument to what is in essence a single overarching issue: whether federal district courts have the power to adjudicate a claim that a state commission determination interpreting and enforcing an interconnection agreement violates federal law. As demonstrated by WorldCom's briefs in both cases, the answer is yes: statutory jurisdiction over such claims exists under both 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6), and the adjudication of such claims is consistent with the Eleventh Amendment.

Moreover, the existence in this case (and *Mathias)* of *bona fide* federal questions can hardly be doubted. Verizon alleged that the state commission's determination requiring reciprocal compensation for calls to ISPs violates a specific FCC order. That asserted violation of a federal regulation plainly arises under federal law.

But that does not mean that federal law governs every claim asserted by Verizon. For example, Verizon alleged that the state commission's determination requiring reciprocal compensation for calls to ISPs violates a negotiated provision of the interconnection agreement between Verizon and WorldCom. Every court of appeals

that has considered *that* issue has held that a commission's alleged misinterpretation of a negotiated interconnection agreement does not constitute a violation of federal law. *See* Br. in Opp. of Resps. WorldCom, *et al.*, at 9-13, *Mathias v. WorldCom Techs., Inc.*, Nos. 00-878, 00-921 (U.S. filed Jan. 16, 2001) (reviewing cases in detail). There is, therefore, no reason for the Court to reach out at this point and address that broader issue.

To the contrary, the Court will fully address the lower courts' need for guidance if it simply answers the questions actually presented and decides whether federal courts may entertain federal-law challenges to state commission enforcement decisions that are not facially insubstantial. There is no reason to go further by deciding on which side of the federal-state divide any specific claim falls. Staking out that dividing line is better left to case-by-case adjudication and percolation in the lower courts. In the unlikely event that a circuit split develops over any agreement-specific issues requiring intervention by this Court, the Court's decision will be aided materially by the lower courts' experience in addressing the myriad possible fact patterns that might arise in this context.

B. Claims of Misinterpretation of Interconnection Agreements Arise Under State Law.

If the Court reaches the issue, it should reject the sweeping argument made by Verizon and Ameritech that federal law governs *every* dispute concerning the interpretation and enforcement of interconnection agreements. *See* Verizon Br. at 20 ("Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law"). That position not only is extreme, it is flatly

contradicted by Congress's express preservation of the states' authority to impose *state law* requirements when reviewing interconnection agreements. 47 U.S.C. § 252(e)(3); *see also id.* § 251(d)(3) (preserving state interconnection regulations not inconsistent with 1996 Act); *id.* § 261(c) (permitting state commissions to impose additional requirements necessary to further competition consistent with the Act and FCC regulations); *id.* § 152 note (Pub. L. No. 104-104, § 601(c)) (Act not to be construed to supersede state or local law unless expressly so provided). Congress would hardly have preserved state law if it viewed interconnection agreements as governed by federal law alone.

The incumbents' position is also contrary to Congress's decision to allow parties to interconnection agreements to negotiate terms "without regard to" the substantive requirements otherwise imposed by the Act and the FCC's implementing regulations. 47 U.S.C. § 252(a)(1). Since such negotiated provisions are not subject to the specific requirements of the relevant federal statute and regulations, the duties created are essentially contractual in nature. Thus, if federal law were to control the enforcement and interpretation of negotiated agreements, it would have to be a federal common law of contracts. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994) (issue not addressed by federal statute would be governed by federal law only through creation of federal common law).

This Court has made increasingly clear that courts may not create federal common law except in the most "narrow areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). A court should contemplate creating federal common law only in "few and restricted" cases "where there is a significant conflict between some federal

policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87 (internal quotation marks and citations omitted). When dealing with a comprehensive statutory scheme, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85. Here, especially given Congress's express preservation of state law applicable to interconnection agreements, *see, e.g.*, 47 U.S.C. § 252(e)(3), the incumbents cannot possibly show that applying state law to the interpretation of negotiated interconnection agreements poses "a significant conflict" with federal policies or interests.

The only statutory support identified by the incumbents for their position is the Act's reference to negotiated agreements as "binding." *Id.* § 252(a)(1). That single word in no way signifies a congressional intent to federalize all obligations created in negotiated interconnection agreements. Clearly, Congress intended that those agreements would constitute "binding" contracts. But if it had wanted the courts to create a federal common law governing those binding contracts, it would have said more than that. After all, applying state contract law to interpret and enforce negotiated interconnection agreements fully effectuates their binding character. Congress could hardly have supposed that by using the word "binding" it was establishing some sort of federal policy barring courts from following the usual approach of applying state law to fill in the gaps left in federal legislation.

Nor does Verizon succeed in showing that the creation of federal common law is warranted here under *Jackson Transit* or *Int'l Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963). In *Jackson Transit*, the Court held that, although federal law required certain parties to enter into collective bargaining agreements and Congress

intended those agreements to be enforceable, *see Jackson Transit*, 457 U.S. at 20-21, the resulting agreements were governed by state law, *id.* at 23-29. *Jackson Transit* thus establishes that federal common law need not govern the interpretation and enforcement of contracts whose existence and binding character is required by federal law.

The Court's earlier decision in *Machinists* is not to the contrary. That case concerned a Railway Labor Act requirement that collective bargaining agreements in the air industry include provisions creating "boards of adjustment" to settle employee grievances. 372 U.S. at 690. Because the federal statute required an agreement to include provisions creating an adjustment board, the interpretation and enforcement of the agreement to comply with that specific statutory requirement was a question of federal law. *Id.* at 690-91. In finding that federal law governed, the Court also observed that labor relations affecting interstate transportation have long been a specifically federal concern under the Railway Labor Act, *see id.* at 686-87, and that the interstate character of the agreements required application of federal law to ensure uniformity, *see id.* at 692 n.15.

Negotiated provisions in interconnection agreements have none of the characteristics that underlay the holding in *Machinists*. Most importantly, *Machinists* held that federal law governed the interpretation of contractual provisions creating boards of adjustment precisely because Congress specifically *required* inclusion of contractual provisions creating such boards. In contrast, section 252(a)(1) of the 1996 Act expressly *exempts* negotiated provisions in interconnection agreements from the Act's substantive requirements. Nor do interconnection agreements implicate labor relations, a field that has been unusually fertile ground for federal common law due to the specific historic context

in which Congress enacted statutes such as the Railway Labor Act to ensure labor peace, *see Machinists*, 372 U.S. at 686-91.

In an attempt to escape the fact that the 1996 Act – unlike the Railway Labor Act – does not impose specific requirements that must be incorporated into negotiated interconnection agreements, the incumbents repeatedly invoke the Fourth Circuit's observation in another context that negotiated interconnection agreements may at times track the substantive requirements of the statute. *See AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). Whether or not that is true, the parties are free to bargain for quite different terms, trading their rights under the Act for specific provisions of greater value to them. While the substantive requirements of the Act may form a backdrop for such negotiations, Congress could not have been clearer that carriers may enter into negotiated agreements "without regard to" those substantive requirements. 47 U.S.C. § 252(a); *see also id.* § 252(e)(2)(A) (prohibiting state commissions from rejecting negotiated agreements that do not comply with Act's substantive requirements). It follows that the negotiated terms of interconnection agreements are not dictated by federal law as they were in *Machinists*. Certainly the Fourth Circuit implied no such thing in *AT&T Communications*, 229 F.3d at 465, and it emphatically rejected the incumbents' position in the present case, *see* Pet. App. 25a-28a.[8]

[8] The notion that interconnection agreements end up merely mirroring federal law is further belied by the fact that the law in this area is dynamic. Here, for example, Verizon makes much of the fact that the interconnection agreement at issue was similar to the then-existing federal regulations in its limitation of reciprocal compensation to "local traffic." Verizon Br. at 8. But that is no longer the relevant standard under current FCC rules. *See supra* p. 6 n.2.

Finally, there is no merit to the incumbents' attempt to liken interconnection agreements to federal tariffs. Formerly, carriers were required to file tariffs for *interstate* services with the FCC, and such tariffs were governed by federal law to prevent rate discrimination and ensure uniform nationwide treatment. *See American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998).[9] But an interconnection agreement is not an interstate tariff requiring uniform treatment nationwide. Rather, an interconnection agreement applies primarily to services *within a single state*. Indeed, Congress specifically provided that states may impose their own requirements in arbitrated agreements. *See, e.g.*, 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b)-(c), 152 note (Pub. L. No. 104-104, § 601(c)). Thus, the need for nationwide uniformity in the case of federal interstate tariffs is absent here.[10]

[9] Pursuant to the market-oriented policies of the Act, the FCC has now issued "detariffing" rules that no longer permit carriers to file federal interstate tariffs for long-distance services, *see In re Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 15 F.C.C.R. 22321 (2000), on the ground that tariffing is no longer "necessary to ensure just and reasonable, nondiscriminatory rates, nor necessary for the protection of consumers," *MCI WORLDCOM, Inc. v. FCC*, 209 F.3d 760, 763 (D.C. Cir. 2000). It would be ironic indeed if the 1996 Act extended federal tariff status to intrastate services just as it spelled the demise of the federal tariff doctrine for interstate services.

[10] To the extent interconnection agreements resemble tariffs at all, they are akin to state rather than federal tariffs. Indeed, the "opt-in rights" on which the incumbents place so much emphasis, *see* 47 U.S.C. § 252(i), are only available within a specific state, not nationwide. *E.g., In re Application of GTE Corp.*, 15 F.C.C.R. 14032, ¶ 314 (2000). Similarly, interconnection agreements are filed with state commissions, 47 U.S.C. § 252(h), not the FCC. The incumbents cite no authority for the proposition that federal law governs state tariffs.

In short, there is no basis whatsoever for the incumbents' contention that federal law governs *every* aspect of the interpretation and enforcement of interconnection agreements. The Act makes plain that Congress intended interconnection agreements to be subject to a mixed regime of federal and state law. To be sure, where Congress determined that federal policies require the promulgation of uniform federal standards for interconnection agreements – either through the specific requirements of the Act itself or through the regulations the FCC is authorized to issue – federal law governs. But that does not transform every dispute involving interconnection agreements into a question of federal law. There is thus no basis for disturbing the unanimous determinations of the courts of appeals that some claims pertaining to interconnection agreements are governed by state law. The precise demarcation between state and federal law in this area is best left to case-by-case adjudication in the lower courts confronting the multiplicity of fact patterns in which this question could arise.[11]

CONCLUSION

For the reasons set forth above and in our opening brief, the Court should reverse the Fourth Circuit's decision that the district court lacked general federal question jurisdiction under 28 U.S.C. § 1331.

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[11] As to the MPSC's Eleventh Amendment arguments, WorldCom respectfully refers the Court to its brief in the *Mathias* case. Br. of Resps. WorldCom Techs., Inc., *et al.*, *Mathias v. WorldCom Techs, Inc., et al.*, 00-878, at 33-50 (U.S. filed Sept. 10, 2001). In addition, we note that the Third Circuit recently joined the majority of circuits that have rejected the Eleventh Amendment arguments raised here. *See MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, __ F.3d __, 2001 WL 1381590, No. 00-2257 (3d Cir. Nov. 2, 2001).

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